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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

KENNETH T. TRUHLAR, PETITIONER

v.

JOHN GRACE BRANCH # 825 OF THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AND THE UNITED STATES POSTAL SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court established a framework for "hybrid" suits arising out of federal labor law. *Vaca* set standards for evaluating a hybrid claim against a union for breach of its "duty of fair representation" (DFR). In *Airline Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991), this Court appeared to set further standards for evaluating certain DFR claims. The Tenth Circuit has held that *O'Neill* was not intended to apply to all DFR claims. The Seventh Circuit has held *O'Neill* strictly applies to all DFR claims. The Ninth Circuit has developed its own test for DFR claims. Conflict and confusion exist regarding what standard applies to DFR claims in a grievance handling context, and how the hybrid "framework" operates. The questions presented are:

1. Whether a judgment rendered on a hybrid claim in the district court solely through this Court's hybrid framework is "altered" on appeal by adjudicating the claim on the merits.

2. Whether application of the *O'Neill* union DFR standard conflicts with the *Vaca* standard when an employee alleges a DFR breach through "arbitrary" or "perfunctory" grievance handling.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 600 F.3d 888. The opinion of the district court (App., *infra*, 12a-34a) is reported at 600 F.Supp.2d 964. The district court judgments are unreported. (App., *infra*, 11a)

JURISDICTION

The court of appeals' judgment was entered on April 12, 2010. A petition for rehearing en banc was denied on May 25, 2010 (App., *infra*, 35a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

This case involves Section 9 of the National Labor Relations Act (NLRA), 29 U.S.C. 159(a); Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185, and Sections 1 and 2 of the Postal Reorganization Act (PRA), 39 U.S.C. §§1001(b), 1206, and 1208(b) and (c). The relevant provisions are reproduced at App., *infra*, 38-41a.

STATEMENT

Petitioner was fired after the United States Postal Service (USPS) provided materially false information to his Union which resulted in the withdrawal of his grievances. Due to the unprecedented application of this Court's "hybrid" framework arising out of *Vaca v. Sipes*, 386 U.S. 171 (1967), this case presents exceptionally important,

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[1] The Order of May 25, 2010 indicates that Petitioner requested Rehearing. However, Petitioner only requested Rehearing En Banc.

related, and recurring questions concerning the uniformity of federal labor law and procedure, specifically Section 9(a) of the NLRA, 29 U.S.C. §159(a) and Section 301 of the LMRA (§301) (29 U.S.C. §185). The first question relates to the procedural application of Court's "hybrid" framework, through which the Seventh Circuit adjudicated the merits of an unaddressed claim, without cross-appeal, in apparent conflict with longstanding precedent of this Court. This issue is vitally important to the uniformity of federal labor law and accompanying federal civil procedure designed to ensure effective and orderly judicial administration.

The related second question squarely presents the deep conflict and confusion among the Circuits regarding the standard for evaiuating a union's duty of fair representation (DFR). Specifically, this Court's decision in *Airline Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991), appears to conflict with *Vaca*, as it may apply to a breach of a union's DFR in handling grievances under a collective bargaining agreement.[2] The Seventh Circuit strictly applies *O'Neill* to all union conduct, including administration of the collective bargaining agreement (i.e. grievance handling). These standards, as interpreted by the Seventh Circuit, exonerate union inaction, and allow for the employer to transmit materially false information to the union in order to induce termination of an employee. In the instant matter below, the Seventh Circuit has now raised the bar to only allow judicial recourse for breach of the DFR when a union "completely bungles" or "intentionally sabotages" a grievance.

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[2] For ease of reference, the "duty of fair representation" is referred to as "DFR."

The Tenth Circuit has reached the opposite conclusion, rejecting *O'Neill's* application to DFR claims involving grievance handling. The Ninth Circuit has developed their own DFR test to consider such claims. The Third Circuit, the D.C. Circuit, and the NLRB have all expressed confusion and/or uncertainty about the standards used to evaluate a union's DFR.[3]

The interest in interpretive uniformity and predictability of federal labor law has been characterized by this Court as "paramount". *Electrical Workers v. Hechler*, 481 U.S. 851, 856-857 (1987). Further review from this Court is needed to clarify the DFR standard and resolve the deep conflict and lack of clarity in the Circuits.

A. The Duty of Fair Representation and Grievance Handling

§301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, provides for suits in the district courts for violation of collective-bargaining contracts between labor organizations and employers without regard to the amount in controversy. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).[4]

The strong policy of favoring judicial enforcement of collective bargaining contracts is sufficiently powerful to sustain the jurisdiction of federal district courts even though the conduct

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[3] Although the Court below later cited to *Airline Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991), this Court has never endorsed a "completely bungles" or "intentionally sabotages" DFR standard.

[4] Petitioner's "hybrid" suit was brought under §301's corollary provision under §2 of the Postal Reorganization Act ("PRA"), 39 U.S.C. §1208(b). PRA "hybrid" suits should be analyzed like §301 suits since the sections are identical in all relevant aspects of a "hybrid" action. App., *infra*, 10a, n. 1.

[complained of] also arguably falls under the jurisdiction of the National Labor Relations Board. *Id.* at 562. §301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate "uniquely personal" rights of employees, including wrongful discharge. *Id.*

In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), this Court mentioned the policy and source of a DFR claim against a union, "The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act." (NLRA) *Id.* at 164. A DRF claim arises out of §9(a) of the NLRA, 28 U.S.C. §159(a), and is meant to serve as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 86-87 (1989), quoting *Vaca*, 386 U.S. at 182.

The "hybrid" suit is a judicially created exception to the general rule that an employee is bound by the result of grievance or arbitration remedial procedures provided in a collective-bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 185-186 (1967). To prevail in a "hybrid" suit against either the company or the Union, an employee must not just show that discharge [or discipline] was contrary to the contract but must also carry the burden of demonstrating breach of duty of fair representation by the union. *DelCostello*, 462 U.S. at 165.

In *Vaca*, this Court discussed the extent of a union's duty to fairly represent an employee. The scope of this duty in the context of a grievance

arbitration proceeding requires that the union "may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *Vaca*, 386 U.S. at 191. Further, with regard to grievance handling, this Court's resolution was clear, "Where an employee can prove he suffered [as the result of a] violation of a collective-bargaining agreement that would have been remedied through the grievance process had the union fulfilled its statutory duty to represent the employee fairly, federal law will provide a remedy." *Vaca*, 386 U.S. at 185-86, applied in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), see also *Edwards v. International Union*, 46 F.3d 1051 (10th Cir. 1995), *cert. denied*, 516 U.S. 811 (1995). "In such instance, the union has effectively ceased to function as the employee's representative." *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1471-72 (10th Cir. 1993). To leave the employee remediless under these circumstances would, in the words of this Court, "be a great injustice." *Edwards*, 46 F.3d at 1051 (quoting *Vaca*, 386 U.S. at 186).

In *DelCostello*, citing to *Vaca* and *Hines*, this Court again explained the finality "rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." 462 U.S. at 164.

In 1987, this Court solidified this line of precedent: "A duty of fair representation claim arises when a union that represents an employee in a grievance or arbitration procedure acts in a discriminatory, dishonest, arbitrary, or perfunctory fashion." *Electrical Workers v. Hechler*, 481 U.S. 851, 865, (1987).

On March 19, 1991, this Court decided *Airline Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991). *O'Neill* involved a DFR claim brought by a group of pilots who were dissatisfied with their union's negotiation of a back-to-work agreement which resolved a strike.[5] *Id.* at 67. The Court announced its continued approval of *Vaca* when addressing a claim involving breach of a union's duty of fair representation in a negotiating capacity. Citing to *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), a union negotiation case, this Court held:

> the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. at 338, that it is wholly "irrational" or "arbitrary."

499 U.S. at 78. In further examination of the meaning of "arbitrary" in a fair representation context, the *O'Neill* Court (again citing to *Huffman*) held that only union conduct which was "irrational" and beyond a "wide range of reasonableness" would breach the duty. 499 U.S. at 79.

Prior to *O'Neill*, the Seventh Circuit split from other Circuits, disavowing *Vaca's* true relevance. *Grant v. Burlington Industries*, 832 F.2d 76, 80 (7th Cir. 1987). Despite *Vaca*, it held that "perfunctory" or "grossly negligent" union conduct was not a breach of the DFR, and only intentional union conduct would suffice. *Id.* The Seventh Circuit eventually viewed this

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[5] O'Neill did not involve union grievance handling, but only negotiation issues under the CBA, it is commonly referred to as a "negotiation case."

Court's decision in *O'Neill* as negating its decision in *Grant v. Burlington Industries*, 832 F.2d 76 (7th Cir. 1987). However, it appears the Seventh Circuit is entrenched again, interpreting *O'Neill* as allowing it to return to the days of *Grant*, now characterizing a union's breach of the DFR to occur only if it "completely bungles" or "intentionally sabotages" a grievance. App., *infra*, 6a.

A Lexis search, as of July 31, 2010, reveals that *O'Neill* has been cited 1,628 times and it is relied on heavily in the federal courts. *O'Neill* has caused pervasive confusion in the federal courts regarding whether it applies to DFR claims involving grievance handling and if so, how it applies to allegations of union omissions (as opposed to actions). Only this Court can resolve the widespread confusion and clarify whether *O'Neill* applies to grievance handling cases, and if so, how it can be squared with DFR duties relating to union omissions and "arbitrary" or "perfunctory" conduct.

B. Limited Factual Background

Petitioner began working for the United States Postal Service ("USPS") in 1984. Possessing a flawless employment record, on November 2, 1998, he was seriously injured on duty when he was struck while driving a USPS vehicle. (R:100-1, p. 7) Petitioner then applied for workers' compensation benefits.

On November 29, 2001, the USPS formally accused Petitioner of falsifying income information on the U.S. Department of Labor's CA-7 Form.[6] (R. 81-3,

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[6]The USPS interpreted the Form to require that Petitioner disclose any income. The Employee Compensation Appeals Board has held that the Form does not place an applicant on notice to

pp.13-15) John Grace Branch #825, the local Branch of the National Association of Letter Carriers (Union), filed three grievances against the USPS, only one of which is relevant here (relating to Petitioner's termination).

On February 25, 2002, Eric Smith (Smith), Petitioner's Union representative, agreed with the USPS to stay the grievance while the Department of Labor's administrative action pended and the U.S. Attorney investigated. (R. 95-2, pp. 11, 12, 16) The USPS expected that Petitioner would be reinstated should he prevail in the Department of Labor. Smith admitted a favorable Department of Labor decision may have persuaded the USPS not to fire Petitioner (R. 95-2, p. 2).[7]

From the time the grievance was filed on November 21, 2001 through September 14, 2005, when Smith withdrew the grievance, Smith never communicated with Petitioner and made no attempt to do so. (R. 95-2, p. 23). Smith never interviewed any witnesses. Smith never requested any documents from the USPS. *Id.* at p. 19.

On May 4, 2005, Petitioner served the USPS with notice of his appeal of the adverse DOL decision. The DOL sent notice of the appeal to the USPS, which received the notice on May 10, 2005. See App., *infra*, 36a.

In August 2005, the USPS was short of workers and a new USPS manager was in place, Diane Anders (Anders). Anders had no personal knowledge

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disclose that information. Karen Spurling, 04-1233 (ECAB 2004). (R. 100-2)

[7] The stay also depended on the outcome of the U.S. Attorney's investigation.

surrounding Petitioner's grievance. Since Petitioner was not on the active rolls, she wanted him replaced. (R. 95-1, p. 23) On August 22, 2005, over three months after Petitioner had appealed, another USPS employee provided Anders with false information that Petitioner had not appealed the adverse DOL decision. See App., *infra*, 37a. Anders relayed this false information to Smith, and he immediately agreed to withdraw all of Petitioner's grievances on the spot.[8] (R. 95-1, p. 26) He never made any effort to verify that Petitioner had not appealed from the adverse DOL decision. (R. 95-2, p. 22) As a result, Petitioner was terminated on September 23, 2005, although he only received notice of his termination by mail on or about October 17, 2005. When Petitioner called Smith to gather information about why he had been terminated, Smith hung up on him. (R. 26-1, ¶13) Petitioner also tried to determine the status of his grievance, but the Union refused to tell him. (R. 26-1, ¶¶13-23) He only learned what happened to any of the grievances during discovery in the instant lawsuit. (R. 26-1, ¶13)

On January 12, 2006, the Employee Compensation Appeals Board (ECAB) of the DOL determined that Petitioner did not falsify information, intentionally or otherwise, on his CA-7 Form. *Kenneth T. Truhlar*, 05-1500 (ECAB 2006). When asked how he felt when he learned that Petitioner had prevailed in the DOL, Smith testified that he felt no particular reaction. (R. 95-2, p. 22)

Petitioner filed a "hybrid" suit alleging that John Grace Branch #825 of the National Association of Letter Carriers (Union) breached its duty of fair

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[8] Evidence exists that the Union and the USPS colluded to get rid of Petitioner.

representation and the USPS terminated him without "just cause" under the CBA.

C. District Court Proceedings

The jurisdiction of the District Court was invoked under 39 U.S.C. 1208 of the Postal Reorganization Act.[9] The district court denied both Defendants' motions to dismiss and discovery proceeded. After fact intensive discovery, both the USPS and the Union moved for summary judgment. Once briefs and Illinois Northern District Local Rule 56.1 Statements of Fact were submitted, the record was lengthy and complex.

The district court began its analysis by stating "Whether the facts establish the existence of just cause is a question of law to be decided by the court". App., *infra*, 27a. Next, the district court determined that, the USPS need only show it "could have concluded" that Petitioner engaged in some misconduct to satisfy the "just cause" requirement under the CBA.[10] App., *infra*, 30a. The district court then granted summary judgment in favor of the USPS. It never reached the merits of petitioner's claim against the Union, but also granted summary judgment in its favor. App., *infra*, 32a. Petitioner timely filed a Notice of Appeal in the U.S. Court of Appeals for the Seventh Circuit.

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[9] Petitioner initially filed his Complaint under 29 U.S.C. 1985, but the Complaint was amended to note 39 U.S.C. §1208 as the source of jurisdiction.

[10] The district court ruled that management's belief need not even be reasonable. App., *infra*, 30a. No party suggested this standard to the district court.

D. Appellate Court Proceedings

The Seventh Circuit Court of Appeals affirmed the summary judgments in favor of the USPS on the §301 claim and against the Union on the DFR claim. App., *infra*, 1a-10a. In doing so, it did not address the merits of the §301 claim, which was adjudicated on the merits in the district court and fully briefed by the parties. Instead, it held that under the "hybrid" framework Petitioner "ignored" the DFR claim in his Reply Brief and forfeited his claim against the Union. App., *infra*, 6a-7a. The Panel further characterized the Union's position on appeal as "defending" its judgment. *Id.* at 7a.

At oral argument, the Panel denied Petitioner's request to file a supplemental brief addressing the DFR claim, and also rejected any notion that remand could occur due to Petitioner's forfeiture of that claim. After application of waiver, the Court still addressed the merits of the DFR claim by applying *O'Neill* standards. App., *infra*, 7a-10a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision has left the effective judicial administration of "hybrid" suits open to chance. The Court of Appeals proceeded on an uncharted course, choosing not to consider the fully briefed appeal between Petitioner and the USPS, denying any request for supplemental briefing on the separate DFR claim against the Union, and summarily adjudicating that claim in favor of the Union using a standard which inherently conflicts with the precedent of this Court and other Circuit Courts.

To Petitioner's knowledge, no federal appellate court has **first** considered the cause of action in a

hybrid suit not addressed in the district court and which was not the subject of any judgment on the merits. Courts traditionally adhere to the "party presentation rule" and decide the issues presented by the parties. See *Greenlaw v. United States*, 554 U.S. 237 (2008). This course affords appellants judicial review of the decisions which they claim have allegedly aggrieved them, and allows courts to effectively consider only the issues before it. See *Id.* However, the Court of Appeals' published decision leaves litigants and the courts in a state of confusion as to the orderly and effective administration of "hybrid" claims. Since this Court initially outlined the "hybrid" framework, only its review of the Court of Appeals' decision can prevent immediate and widespread confusion.

Substantial confusion has already spread through the federal courts regarding which standard applies to an employee's DFR claim for arbitrary or perfunctory grievance handling. In *Webb v. ABF*, 155 F.3d 1230 (1998), *cert. denied*, 526 U.S. 1018 (1999), the Tenth Circuit rejected that *O'Neill* was a departure from the DRF grievance handling standards decreed in *Vaca*, 155 F.3d 1247. In *Beck v. UFCW, Local 99*, 506 F.3d 874, 879-880 (9th Cir. 2007), the Ninth Circuit followed its previous line of precedent diverging post-*O'Neill* and openly designed its own DFR "continuum" standard, relaxing *O'Neill* standards, and concluding a union breaches its DFR when it fails to perform a ministerial act which results in significant employee harm. On the other hand, the Seventh Circuit strictly applies *O'Neill* to all union conduct mandating that none is a breach of the DFR without being "so far outside a wide range of reasonableness, as to be irrational." See App., *infra*, 8a.

The D.C. Circuit has overtly expressed uncertainty and lack of clarity about the proper DFR standards. See *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers v. NLRB*, 41 F.3d 1532 (D.C. 1994). The NLRB has long referred to the difficulty it has in determining where the lines of union action [and inaction] cross the line from negligence into a breach of the DFR. *Unlicensed Div., Dist. No. 1-MEBA/NMU*, 312 NLRB 944, 947-948 (1993)

This uncertainty has percolated within the lower federal courts to the extent where panels almost focus entirely on the "irrational" standard in *O'Neill* to the exclusion of the "arbitrary" or "perfunctory" standard under *Vaca*.[11] The Court of Appeals' conflict threatens the uniformity of federal labor law and federal procedure. Accordingly, the questions presented are of great importance to the public, the courts, the NLRB, and the practicing bar. Moreover, this Court's review would supply a guide for intelligible decisions in the future. See *Still v. Norfolk & W. R. Co.*, 368 U.S. 35, 43-44 (1961) (granting certiorari to clarify previous holding and guide future decisions).

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[11] Petitioner argued that the Union's conduct was perfunctory in failing to investigate Petitioner's grievance. The Seventh Circuit did not mention "perfunctory" union conduct as prohibited under *Vaca*. Instead, it characterized Petitioner's allegation that the Union did not conduct a "sufficiently thorough investigation." App., *infra*, 7a.

I. When only One Cause of Action in a 'Hybrid Suit" is Adjudicated on the Merits in the District Court and the Other is Unaddressed, Adjudicating the Unaddressed Cause on the Merits Alters the Judgment on Appeal

A. The Seventh Circuit's Failure to Address the Claim Fully Briefed and Presented to It Is A Substantial Departure From The Usual Course of Proceedings.

As of April 12, 2010, Petitioner had spent nearly nine years traversing the grievance procedure associated with the Collective Bargaining Agreement (CBA) and the federal court system. The district court had determined that his cause of action against the USPS failed on the merits and granted summary judgment. App., *infra*, 28a. The district court also had dismissed his DFR claim, a separate cause of action, against the Union without addressing it. *Id.*

Petitioner sought review in the Seventh Circuit on both causes. Critically, under the "hybrid" framework set by this Court in *Vaca*, if Petitioner succeeded on his appeal against the USPS, the judgment in favor of the Union would fail, since the only basis for its entry (the USPS judgment) would no longer exist. Accordingly, there was no need to seek review of dismissal of the DFR claim, and no need to multiply the appeal by briefing irrelevant matters. See *Stevens v. Northwest Ind. Dist. Council, United Bhd. of Carpenters*, 20 F.3d 720, 724, n. 9 (7th Cir. 1994) (chastising appellant for briefing claim not decided on the merits below).

To Petitioner's knowledge, the Seventh Circuit has always addressed the merits of the main claim

presented prior to turning to any claimed alternative grounds.[12] See *Am. Land Holdings of Ind., LLC v. Jobe*, 604 F.3d 451 (7th Cir. 2010); *Guaranty Bank v. Chubb Corp.*, 538 F.3d 587 (7th Cir. 2008); *Purtell v. Mason*, 527 F.3d 615 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 411 (2008) (citations omitted). The Seventh Circuit's refusal to address the main claim in any fashion, and instead applying waiver to adjudicate the second cause of action is a highly unusual departure from the course of appellate procedure. Such drastic departure warrants review through this Court's exercise of its supervisory powers.

Moreover, the irregularity of the Seventh Circuit's interpretation of the "hybrid" framework endorses multiplying litigation on appeal. An appellant who seeks review of one hybrid claim would be forced to argue every basis in opposition to both hybrid claims in his opening brief. This is so because the Seventh Circuit applies waiver to any arguments not raised in the opening brief, and raised for the first time on appeal. *Argyopoulos v. City of Alton*, 539 F.3d 724 (2008); *United States v. Spaeni*, 60 F.3d 313 (7th Cir. 1995), *cert. denied*, 516 U.S. 997 (1995).[13] Simply replying to the arguments presented by an appellee will not suffice since the different causes involve discrete sets of facts and many arguments will exist which are not contained within an appellee brief. Even the Court

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[12] The Seventh Circuit even did so in another "hybrid" matter. In *Ooley v. Schwitzer Div., Household Mfg., Inc.*, 961 F.2d 1293 (1992), the Seventh Circuit took the exact opposite position that it did in the matter below. In *Ooley*, the Circuit held the DFR analysis hinged on the merits of the contract [§301] claim. *Id.* at 1304.

[13] All federal courts appear to apply some form of this rule on occasion.

below has identified the negative effects and counterintuitive nature of such a rule. *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003), *cert. denied*, 539 U.S. 910 (2003) (forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation).

By not addressing the §301 claim fully briefed against the USPS first, and interpreting the "hybrid" framework to endorse multiplication of litigation, the Appellate Court has overlooked strong procedural and equitable principles articulated by this Court and adhered to by this Court and others for nearly 95 years. See *Brown v. Fletcher*, 237 U.S. 583; 35 S. Ct. 750; 59 L. Ed. 1128 (1915) (appellate courts should decide cases on the merits presented). See *Greenlaw v. United States*, 554 U.S. 237 (2008) (applying "party presentation" rule requiring courts to decide matters as presented).

The Seventh Circuit's interpretation of this Court's hybrid framework established in *Vaca* is improper and also a highly unusual departure from the course of appellate procedure effectively depriving Petitioner of the orderly administration of justice. Such drastic departure warrants review through this Court's exercise of its supervisory powers.

B. The Seventh Circuit has Misinterpreted the 'Hybrid" Framework to Create an Anomaly Allowing for Alteration of Judgments on Appeal Without any Cross-Appeal

On appeal, Petitioner and the USPS fully briefed the §301 claim. The Union took no cross-appeal, conditional, or otherwise. The Seventh Circuit interpreted the "hybrid" framework to allow it to

address the previously unaddressed merits of the DFR claim, to enter judgment on the merits, and allow it to bar the §301 claim. The Seventh Circuit termed this action on appeal as allowing the Union to "defend" its judgment below. App., *infra*, 6a-7a.

The principle underlying the issue is well-settled in the federal courts:

> Absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, but may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999). More than 70 years ago, this Court deemed this limitation "inveterate and certain." *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937). On the other hand, a significant limitation is present, "A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment." *Northwest Airlines v. County of Kent*, 510 U.S. 355, 364 (1994) (citation omitted)). A cross-petition is required, however, when the respondent seeks to alter the judgment below. *Id.*

This Court has not yet spoken on how the "hybrid" framework applies (in a procedural context) when both the employer and the union are defendants, but only one claim is adjudicated on the merits against one defendant (which results in the dismissal of the second claim). A troubling anomaly presents when the first judgment in the district court is on the merits (the §301 claim here), and the second judgment is simply

entered due to the failure of the other claim (the DFR claim here). Under this scenario, the second [DFR] judgment can hardly be viewed as one which is entered upon consideration of the legal or factual consideration of the [DFR] claim itself. Therefore, it seems clear the district court DFR judgment was not rendered "on the merits." 18 Lawrence B. Solum, 18-131 *Moore's Federal Practice* - Civil § 131.30(3)(a) (3rd Ed. 2009).

Petitioner submits the district court's characterization of the Union judgment as a "summary judgment" is a misnomer, or at the least, inaccurate since it was not "on the merits." Rather, the judgment was more akin to a dismissal without prejudice, since the merits of the claim were not considered. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (Holding the primary meaning of "dismissal without prejudice" is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim); *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046, 1048-1049 (3d Cir. 1994), *cert. denied*, 510 U.S. 868 (1993) (distinguishing dismissals not on the merits which require cross-appeal from summary judgment on the merits). *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003) (appellee may not enlarge rights on appeal, absent a cross-appeal, by seeking dismissal on the merits when initial judgment was not). See also Federal Rule of Civil Procedure 41(b).

A similar sound principle exists in the RESTATEMENT OF JUDGMENTS (Second) : "When a dismissal is based on two determinations, one of which would not render the judgment a bar to another action on the same claim, the dismissal should not operate as a bar." *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 11 (4th

Cir. 1989). RESTATEMENT (Second) OF JUDGMENTS § 20, Comment e and Illustration 4 at 173.

The Seventh Circuit's decision also diminishes the rights of Petitioner, since the DFR claim on appeal now wields itself as a weapon to defeat the §301 claim and evade judicial review. Neither appellee had such rights after the district court judgments were entered. The DFR judgment was hollow and its existence was solely dependent on the §301 judgment. The Court below has turned both judgments upside down, vastly changing the legal landscape and enlarging appellee rights without a cross-appeal.

Even if the DFR claim was properly before the Court of Appeals, it viewed the "hybrid" framework as mandating automatic waiver of the DFR claim. After almost nine years in the grievance process and the federal court system, this deprived the Petitioner of judicial review of his §301 claim. The denial of Petitioner's request for supplemental briefing and application of waiver was inappropriate. Instead, under the unique circumstances presented, the Court of Appeals should have at least considered the equitable principles in *Dandridge v. Williams*, 397 U.S. 471 (1970), prior to applying waiver. This Court indicated: "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of the question." *Id.* at 476, n.6. The district court never considered the merits of the DFR claim, and after consideration of the §301 claim, remand would be appropriate so the district court could address the discrete set of facts and law at issue.

Finally, *Dandridge's* principles were especially appropriate in the Court below, as it identified only

three facts in the record to support the Union's decision to abandon Petitioner's grievances, all of which were in error. It determined that Smith had considered the U.S. Attorney's basis for declining criminal charges against the Petitioner. App., *infra*, 8a. This is serious error caused by the procedural irregularity below.

Smith actually testified at his deposition in 2008 that he understood Petitioner was criminally charged. (95-2, p. 14) Therefore, he did not consider the U.S. Attorney's declination to prosecute before withdrawing the relevant grievance. Second, the Court credited Smith for his meeting with the postmaster, apparently as part of his investigation. App., *infra*, 8a. However, the meeting occurred over four years after the alleged conduct, the meeting was called by the postmaster, and the only thing which transpired at the meeting was Anders provided the false information (regarding the DOL appeal) to Smith. Most importantly, the Court highlighted Smith's review of the Postal Inspection Service (PIS) Memorandum. App., *infra*, 8a. However, the President of the National Union testified that the local unions are taught not to accept information from the Memorandum as true because the Postal Inspectors omit evidence which is favorable to the employee and are wrong in too many instances. Instead, Smith admitted he accepted all of the information in the Memorandum as true. Misapplication of the "hybrid" framework has allowed for a biased, inaccurate, and incomplete report to act as a substitute for ministerial fact gathering (i.e. attempting to speak with a grievant).

Based on the above, Petitioner has suffered significant prejudice, particularly since the district court erred. Under the circumstances, application of waiver, instead of remand, was inappropriate (should

the district court's §301 judgment been in error). At the least, supplemental briefing should have been permitted if Petitioner was required to litigate another judgment on the merits. Although Petitioner recognizes this Court's Rules do not expressly provide for correcting injustices, the procedural course is so out of bounds, and a departure from the usual course, that exercise of this Court's supervisory powers is appropriate to reach this injustice.

II. The Courts of Appeals are Divided Regarding Which Standards Govern the Union Duty of Fair Representation in Grievance Handling

A. The Circuit Courts' Are Applying Conflicting Standards in DFR Claims Related to Union Grievance Handling.

Beginning in *Vaca*, this Court recognized that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. *Vaca v. Sipes*, 386 U.S. 171, 190-191 (1967). Then, in *DelCostello* this Court mentioned "perfunctory" as a separate category of prohibited union conduct: "A duty-of-fair representation claim arises when a union represents an employee in a grievance or arbitration procedure acts in a "discriminatory, dishonest, arbitrary, or perfunctory fashion." 451 U.S. at 164. This passage was again cited in *Electrical Workers v. Hechler*, 481 U.S. 851, 864 n. 6 (1987).

Thereafter, disagreement developed in the federal courts regarding interpretation of a union's DFR. The Seventh Circuit recognized it had split from the other Circuits in believing the DFR required a showing of intentional union misconduct. *Grant v.*

Burlington Industries, 832 F.2d 76 (7th Cir. 1987). It reasoned the split from the First, Sixth, and Ninth Circuits, where those Circuits all had held that "arbitrary" or "perfunctory" union conduct breached the DFR, was due to differing interpretations of *Hines*, *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) and *Vaca*. At least one respected commentator primarily blamed the federal courts, alleging no clear guidance had been provided as to what constitutes a violation of the duty DFR. John C. Truesdale, *The NLRB and the Duty, in* THE CHANGING LAW OF FAIR REPRESENTATION, 42-43 (Jean T. McKelvey ed., 1985).

In 1991, this Court decided *Airline Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). In *O'Neill*, this Court utilized the standard from *Huffman*, another negotiation case, stating that a "union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside 'a wide range of reasonableness' as to be irrational. 499 U.S. at 67. It cited to the tripartite standard in *Vaca*, but made no comment on where perfunctory union grievance handling fit into the new "irrational" analysis, previously reserved only for negotiation cases. 499 U.S. at 78. In further examination of the meaning of "arbitrary" in a fair representation context, the *O'Neill* Court (again citing to *Huffman*) held that only union conduct which was "irrational" and beyond a "wide range of reasonableness" would breach the duty. 499 U.S. at 79.

In discussing the breadth of its holding, this Court stated it did not see "a bright line" between "contract administration" and "contract negotiation,"

but made no reference to grievance handling matters.[14] Accordingly, no distinct basis exists for the application of *O'Neill* "wholly irrational" standards to union grievance handling, particularly in the setting where an employee claims that a union failed to press a grievance in accord with its DFR. However, since *O'Neill* did not contain limiting language, a deep conflict has percolated in the Circuits regarding whether this Court intended *O'Neill* to apply to union conduct, including arbitrary or perfunctory grievance handling.

In *Webb v. ABF Systems, Inc.*, 155 F.3d 1230 (10th Cir. 1998), the Tenth Circuit expressly rejected an employer's claim that *O'Neill* had abandoned the "perfunctory" standard of union grievance handling referred to in *Vaca* and *Electrical Workers*. 155 F.3d at 1240. The Tenth Circuit reasoned *O'Neill's* silence on union perfunctory conduct supported its survival, "...we believe that the prohibition against "perfunctory" conduct remains the law despite its absence from the discussion in *O'Neill.*" *Id.* [15] The Tenth Circuit agreed with the Eighth Circuit's definition of "perfunctory" (the union acted without concern or solicitude, or gave a claim only cursory attention'), noting that such a definition was in line with Websters Third New International Dictionary (Unabridged) 1678 (1986): "CURSORY, MECHANICAL ... lacking in interest or

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[14] In *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), this Court cited O'Neill's "irrational" standard with approval. However, *Marquez* involved interpretation of a union-security clause and was not related to union grievance handling.

[15] Contrast *Webb* with *Robertson v. Burlington Northern & Santa Fe Ry.*, 216 Fed. Appx. 724 (10th Cir. 2007) (unpublished), where the Tenth Circuit openly questioned the precise role of "perfunctory" conduct in the DFR analysis.

enthusiasm: APATHETIC, INDIFFERENT." 150 F.3d at 1240; (citations omitted)

On another front, the Ninth Circuit has developed its own "continuum" test when analyzing a DFR claim under federal labor law. *Beck v. UFCW, Local 99*, 506 F.3d 874 (9th Cir. 2007). On one end of the continuum is intentional conduct by the union where it exercises judgment, even if ultimately wrong. *Id.* at 879-880 "So long as the union exercised its judgment, no matter how mistakenly, it will not be wholly irrational." *Id.* On the other end of the continuum, where a breach may be determined to exist:

> are actions or omissions that are unintentional, irrational or wholly inexplicable, such as an irrational failure to perform a ministerial or procedural act. The United States Court of Appeals for the Ninth Circuit has referred to such actions or omissions as "arbitrary" action. Courts have consistently refused to accept unions' claims that their actions involved any judgment or strategy where the union simply failed to perform some procedural act.

Id. at 880. This standard attempts to harmonize the *Vaca* and *O'Neill* decisions. It recognizes that a union's negligence relating to the basic union functions is a clear example of arbitrary and perfunctory conduct. See *Ruzicka v. General Motors Corp.*, 649 F.2d 1207 (6th Cir. 1981) ("Ruzicka II"). The standard also properly takes into account the *Vaca* directive that ignoring a meritorious grievance is a breach of the CBA. 386 U.S. at 191. Since *O'Neill* only considers the union conduct up until the final action is taken, it directly conflicts with *Vaca* when the grievance is (or could have been) meritorious.

A panel of the Sixth Circuit found itself divided on whether to apply *Vaca* or *O'Neill* to a claim of a union's arbitrary and perfunctory conduct in failing to appeal a grievance. *Linton v. United Parcel Serv.*, 15 F.3d 1365 (6th Cir. 1994). There, the majority applied *Vaca* and found the union simply "gave up", breaching the DFR. 15 F.3d at 1371. The dissent would have applied *O'Neill*. *Id.* at 1374-1375.

The Seventh Circuit is on the other end of the spectrum. It strictly applies *O'Neill* to all union conduct, including allegations regarding breach of a DFR. 1-10a. See also *Ooley v. Schwitzer Div., Household Mfg., Inc.*, 961 F.2d 1293 (7th Cir. 1992), *cert. denied*, 506 U.S. 872 (1992). More problematic in its application of *O'Neill* is the Seventh Circuit's new decree that "hindsight" is not relevant to consideration of a DFR claim in the grievance context.[16] App., *infra*, 9a. Under this standard, contrary to *Vaca*, whether the grievance is meritorious and the union's inaction recklessly disregarded the employee's rights becomes irrelevant. Put another way, as long as the slightest false or negative information yields a "rational" decision under *O'Neill*, a union's reckless disregard of employee rights will never be breach of its DFR.

Further insight into the Seventh Circuit's departure from *Vaca*, and its allowance of arbitrary and perfunctory union conduct is apparent from the Seventh Circuit's opinion in *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171 (7th Cir. 1995). There, in relation to DFR standards, it stated: "What is required to be shown goes considerably beyond the requirements of a

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[16] In negotiation context, O'Neill contains language which suggests a union "settlement" is to be analyzed at the time the settlement was made to determine if the conduct was rational. 499 U.S. at 69.

malpractice suit." *Id.* at 1176. Such a threshold entirely immunizes union inaction, is in direct conflict with *Vaca* DFR standards, and is in conflict with the Ninth and Tenth Circuits view of the same law.

The D.C. Circuit, post-*O'Neill*, has also indicated that although the Board was continuing to enforce the DFR under the NLRA, "the parameters of this duty remain unclear and confusing." *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers v. NLRB*, ("*IUE*"); 41 F.3d 1532, 1537 (D.C. Cir. 1994).

The remaining Circuits appear to apply *O'Neill* in some fashion to union conduct in evaluating the DFR. However, even those Circuits have developed different interpretations of the breadth of *O'Neill*. The conflict within the Circuits is longstanding and continues to detract from Congress' stated goal of a uniform body of federal labor law. Accordingly, plenary review is warranted.

B. Application of the Subjective *O'Neill* Standard to a Claim of Union Inaction Is Incompatible with the Objective "Arbitrary" or 'Perfunctory" Standard from *Vaca*.

The conflict between *Vaca* and *O'Neill* standards is stark in the grievance handling context. There, the *O'Neill* standard is plainly incompatible with a proper analysis of union conduct relating to "perfunctory" processing of a grievance. This creates a gaping hole in the DFR protections due an employee and loads the dice in favor of the union (and employer). For instance, with only an "irrational" decision to fear, a union has little incentive to conduct any independent investigation. As mentioned above, with any

information (even a few words), the DFR can never be breached under *O'Neill*, since it is irrelevant whether the union speaks with the grievant or affirmatively acts in any fashion. The standard removes any incentive for the Union to act, since it is safer relying on negative information and being shielded from breach of the DFR, as opposed to muddying the waters in an attempt to gather favorable information. This cannot be the result the Court intended by its holding in *O'Neill*.

More specifically, the *O'Neill* standard falters because it focuses on the subjective conduct of the union decision-maker. It becomes unimportant whether a ministerial task could have easily discovered information that would have immediately rendered the grievance meritorious (i.e. speaking with the grievant). This type of inquiry also fails to take into account what a reasonable person (or other objective person) would have done. Instead, it focuses on the decision-maker at the earliest point in time, without the benefit of hindsight, and endorses arbitrary and perfunctory conduct.

O'Neill does contain a withdrawn objective ingredient. Referencing *Vaca*, this Court held: "....a union's actions are arbitrary only if, *in light of the factual and legal landscape at the time of the union's actions*, the union's behavior is so far outside a "wide range of reasonableness," 499 U.S. at 67. However, the "wide range of reasonableness" expands any objectivity almost entirely out of the standard, particularly since it only considers information in the union's possession at the time it refuses to press a grievance (as the Seventh Circuit held). In essence, the objective component is rendered illusory by the subjective component and time limitation (whether decision was "wholly irrational" when it was made). Said another way, *O'Neill*

possesses no element requiring consideration of anything the union could (or should) have done to develop a grievance. Even the most basic of ministerial tasks, such as speaking with the grievant has no relevance, since any "rational" decision complies with the DFR standard.

Further support exists for the Tenth Circuit's position that *O'Neill* standards were never to apply in the grievance context, particularly one when inaction was alleged to be a breach of the DFR. In its opinion, *O'Neill* clearly analogized the DFR to that of other fiduciaries. 499 U.S. at 75. However, since *O'Neill* was never called upon to address union DFR standards in a grievance setting, it did not consider the fiduciary duty standards applicable to trustees, who also have considerable discretion to exercise judgment. There, a trustee is not rescued through subjective inquiry when inaction or erroneous interpretation of the trust is in play:

> *h. Trustee's failure to use his judgment.* The court will control the trustee in the exercise of a power where its exercise is left to the judgment of the trustee and he fails to use his judgment. Thus, if the trustee without knowledge of or inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim exercises or fails to exercise a power, the court will interpose.

RESTATEMENT OF TRUSTS (Second) §187, comment h; p. 402 (1957); Although substantial deference is given to a trustee to use his judgment, a trustee is also not allowed to act beyond the limits of reasonable judgment. RESTATEMENT OF TRUSTS (Second) §187,

comment i, p. 406 (1957). However, it appears no similar principles exist in the DFR analysis under *O'Neill*.

Finally, the Restatement of Trusts (Second) also does not forgive a fiduciary if it mistakes the extent of its duties by failing to interpret the trust. RESTATEMENT, §187, comment h, Illustration 8. *O'Neill* offers no link to what duty the CBA contemplates when a grievance is abandoned by the union and no arbitration occurs. Accordingly, *O'Neill* standards are woefully deficient as applied to grievance handling when the CBA offers elevated substantive protections to employees.

Before *O'Neill*, *Vaca* and *Electrical Workers* stood as the front line ensuring that arbitrary and perfunctory union grievance handling was a breach of the DFR. However, *O'Neill's* restrictions in the grievance handling context now impede *Vaca's* protections. The fundamental differences in the *Vaca* and *O'Neill* standards warrant review and clarification of the proper standards to evaluate a claimed breach of a union's DFR in a grievance setting. Furthermore, without a definitive resolution, the body of federal labor law in this area will continue to be uncertain, and aggrieved employees will be left without judicial recourse in the face of *O'Neill*.

III. The District Court Decision Removes Due Process Protections For Federal Workers

A. "Just Cause," Under the Relevant CBA Requires Management to Prove Intentional Misconduct by Clear and Convincing Evidence.

Although not a proper basis for Certiorari, the District Court failed to apply the proper standard

under the CBA and failed to afford Petitioner the due process protections Congress afforded him. See *Winston v. United States Postal Service*, 585 F.2d 198, 208-209 (7th Cir. 1978). This was the claim presented by Petitioner in the Court below, but left unaddressed.

Should Certiorari be granted, Petitioner intends to establish that the relevant CBA mandates that management must prove the conduct was intentional to sustain a just cause finding resulting in discharge. Further, the standard of proof was heightened under the CBA. The Union agrees that the burden of proof to sustain Petitioner's discharge was "clear and convincing evidence" and the USPS has offered no resistance to this fact. The President of the National Union concurred that the CBA requires the USPS to sustain a heightened burden of proof for serious misconduct (which was the subject of Petitioner's grievances).

B. The District Court Ignored the "Just Cause" Requirement In the Relevant CBA and Allows Any Discipline Based on Management Subjective Belief, Even if Unreasonable.

The district court was bound to the terms in the CBA. It was not reviewing an arbitrator's decision. As described above, in order to sustain a "just cause" finding and discharge, the relevant CBA required the USPS to prove by clear and convincing evidence that Petitioner knowingly and intentionally lied on the CA-7 Form. Obviously, this is a very high standard.

Nevertheless, the district court concluded that a court was not required to hold the USPS to the terms of the CBA because it would "constrain the notions of "just cause" too tightly." No authority was offered for

this reasoning. Instead of interpreting the "flexibility" attached to "just cause" as a provision to protect the employee's rights in discharge cases, it was interpreted as giving *carte blanche* to the USPS. Then, the district court held even if "knowingly" was the true standard for "just cause" under the CBA, the USPS is exempt from it because there was a labor manual which prohibited "unacceptable conduct.[17] See App., *infra*, 16a.

The district court analysis was already seriously flawed. However, it then held: "Thus, even if USPS lacked just cause to conclude that Plaintiff *knowingly* violated a federal statute, it nevertheless could have concluded from the evidence before it that there was just cause to conclude that Plaintiff had violated the ELM." *Id.* at 30a. Nowhere in the CBA is a "could have concluded" standard authorized, let alone any clause which satisfies the heightened "just cause" standard because of an unreasonable belief.[18] Accordingly, it was error to apply such a low (circular) standard which allows for any management decision to constitute "just cause."

The "just cause" principle contained within the CBA applies to all federal workers guaranteed protections under the Postal Reorganization Act, 39 U.S.C. §1001(b); 39 U.S.C. §1206. Allowing this error to escape judicial review puts the CBA, and untold postal workers, at risk in the future days ahead.

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[17] Nothing in the record suggests that the USPS can avoid the "just cause" burden by citing to a labor manual. It still must establish knowing misconduct by clear and convincing evidence in a discharge grievance.

[18] It appears the district court may have applied a "business judgment" standard from other areas of labor law. Such a standard was inapplicable here under the CBA.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted.

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(any footnotes trail end of each document)

No. 09-1652

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KENNETH T. TRUHLAR,
Plaintiff-Appellant,
v.
UNITED STATES POSTAL SERVICE, et al.,
Defendants-Appellees.

December 3, 2009, Argued

April 12, 2010, Decided

COUNSEL: For KENNETH T. TRUHLAR, Plaintiff - Appellant: Matthew L. McBride, III, Attorney, SNECKENBERG, THOMPSON & BRODY, LLP, Chicago, IL.

For JOHN G. BRANCH, # 825 of the National Association of Letter Carriers, Defendant - Appellee: Peter Herman, Attorney, COHEN, WEISS & SIMON, New York, NY.

For UNITED STATES POSTAL SERVICE, Defendant - Appellee: Samuel D. Brooks, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.

Before EASTERBROOK, Chief Judge, and MANION and EVANS, Circuit Judges.

OPINION

EVANS, *Circuit Judge*. In 1998, Kenneth Truhlar was working as a letter carrier for the United States Postal Service in Westmont, Illinois, when a car rear-ended his mail truck, injuring his back and neck. Truhlar sought partial disability payments but failed to disclose in the disability compensation paperwork that he was earning money playing bass guitar for a rock band called BANG!. When the Postal Service discovered the omission, it launched an investigation to determine whether he had engaged in misconduct. It ultimately concluded that he had, and in 2005, Truhlar was fired. He sued the Postal Service and his local union, John Grace Branch # 825 of the National Association of Letter Carriers, under § 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, claiming that the Service breached the collective bargaining agreement by firing him without just cause and that the union breached its duty of fair representation. Truhlar's suit, which is a form of hybrid litigation, came to an end when the district court granted the defendants' motion for summary judgment. Truhlar appeals that decision.

Although the parties disagree over a number of (ultimately immaterial) details, the following facts are undisputed. In order to collect partial disability payments following his injury, Truhlar periodically submitted a Department of Labor (DOL) form called the CA-7, which includes the following question: "Have you worked outside your federal job during the period(s) [for which you are claiming disability]? (Include salaried, self-employed, commissioned, volunteer, etc.)." Truhlar responded "no" to this question or failed to answer it on 24 CA-7 forms he submitted between 2000 and 2001, despite the fact that

he earned between $ 8,775 and $ 11,000 performing with BANG! during that period. After a Postal Service inspector videotaped Truhlar playing with the band, another inspector interviewed him about the discrepancy. Truhlar claimed he misunderstood the question on the form. In June 2001, the Postal Service notified Truhlar that he was being placed on off-duty status for "failure to provide correct earning information on your Form CA-7." A local union steward filed a grievance on Truhlar's behalf, and when the grievance was denied, union representative Eric Smith appealed in accordance with the collective bargaining agreement's (CBA) three-step grievance procedure.

Meanwhile, the Postal Service continued to follow Truhlar, and in September 2001 a postal inspector issued an Investigative Memorandum finding that he "failed to report his outside employment and the subsequent income to the U.S. Department of Labor." Two months later the Postal Service issued Truhlar a notice of removal, explaining that his failure to disclose his band income on the CA-7 forms violated four provisions of the Postal Service's employee manual, including provisions prohibiting dishonest and immoral conduct. The union grieved the removal decision on Truhlar's behalf, and when the grievance was denied, Smith filed a second appeal under the CBA.

Shortly after Truhlar received the notice of removal, the DOL initiated a forfeiture action seeking repayment of the disability benefits he had received. At the time, the U.S. Attorney's office was also considering bringing criminal charges against Truhlar, and the Postal Service and Smith agreed to hold Truhlar's grievances in abeyance pending the

disposition of those charges and the DOL proceedings. In May 2004, the DOL found that Truhlar knowingly omitted his band earnings from the CA-7 forms, and it issued a decision requiring Truhlar to forfeit his disability payments. Almost a year later, Truhlar appealed the DOL's decision to the Employee Compensation Appeals Board without telling Smith. Around the same time, the U.S. Attorney's office decided not to pursue criminal charges in part because the loss amount was low and the DOL had ordered Truhlar to forfeit his disability payments.

Late in the summer of 2005, the newly appointed local postmaster, Diane Anders, called Smith to find out what was happening with Truhlar's grievances (under the CBA the Postal Service could not officially terminate Truhlar until the grievances were resolved and he remained on off-duty status during all this time). After Smith told Anders the grievances were being held in abeyance, she obtained from Postal Service Labor Relations Specialist Anthony Intoe a copy of the Investigative Memorandum and the DOL's decision finding that Truhlar knowingly failed to report his band income. Intoe incorrectly told Anders that Truhlar had not appealed the adverse DOL decision. Anders then met with Smith to discuss Truhlar's grievances and told him (based on the inaccurate information she received from Intoe) that the DOL proceedings were over. Based on his review of the Investigative Memorandum, the DOL decision, and the U.S. Attorney's rationale for declining criminal charges, Smith decided that the union should not pursue Truhlar's grievances any further. In September 2005, he notified Truhlar that his grievances had been withdrawn. With that, Anders officially terminated Truhlar's employment. Less than

four months later, the Employee Compensation Appeals Board reversed the DOL's decision. It determined that the CA-7 form "did not reasonably put [Truhlar] on notice that he had to report all earnings" and thus concluded that he was not required to repay his disability earnings.

Following the favorable outcome to his DOL appeal, and after unsuccessfully pursuing an unfair labor practice charge against John Grace Branch # 825 with the National Labor Relations Board, Truhlar filed the current suit. He claimed that the Postal Service violated the CBA by firing him without just cause and that the union breached its duty of fair representation in connection with the grievance proceedings. The Postal Service and John Grace Branch # 825 sought summary judgment, arguing that Truhlar's suit is untimely, and that even if it were timely he could show neither that the Postal Service breached the CBA nor that the union failed to represent him fairly. The district court determined that the suit was timely but that the Postal Service's decision to fire Truhlar was based on just cause, as the CBA defines that term. The court granted the defendants summary judgment without considering the question of fair representation.

We review de novo the district court's grant of summary judgment to the defendants. *Nemsky v. ConocoPhillips Co.*, 574 F.3d 859, 864 (7th Cir. 2009). Although national labor policy strongly favors private over judicial resolution of disputes arising under a CBA, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965), § 301 of the LMRA allows a union member to seek relief in federal court when his union breaches its duty to

represent him fairly, *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983).[1] The idea behind § 301 is that a union member should have judicial recourse if, during the arbitration process, his union completely bungles (or intentionally sabotages) an otherwise meritorious grievance. *Bell v. Daimler Chrysler Corp.*, 547 F.3d 796, 804 (7th Cir. 2008). Truhlar's hybrid claims against the union and the Postal Service "are inextricably interdependent"; in order to recover from either he must prevail against both. *DelCostello*, 462 U.S. at 164-65 (citation omitted). In other words, to avoid summary judgment, Truhlar must show both that John Grace Branch # 825 breached its duty to represent him fairly in pursuing his grievances and that the Postal Service violated the CBA.

The district judge granted the defendants summary judgment after concluding that the Postal Service's decision to fire Truhlar did not violate the CBA. Because that conclusion doomed Truhlar's claim against the union, the district court did not discuss whether the union breached its duty of fair representation, although the union sought summary judgment on the ground that it had not. In his opening brief on appeal, Truhlar argues that the district court incorrectly concluded that the Postal Service complied with the CBA in firing him. In response, the union renews its arguments that Truhlar's suit is untimely and that he cannot show that the union breached its duty to represent him fairly. Yet, in his reply brief, Truhlar addresses neither the timeliness question nor the union's argument on the merits. At oral argument his counsel explained that he did not think he needed to brief any argument he had not lost in the district court, but it is well-established

that an appellee is free to defend a judgment based on any argument raised before the court below. *See Camp v. TNT Logistics Corp.*, 553 F.3d 502, 505 (7th Cir. 2009); *Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 761 (7th Cir. 2008). Just because the district court found it unnecessary to address all of the union's defenses does not mean Truhlar is free to ignore them now that the union has pressed them on appeal. *See United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560, 68 L. Ed. 1087 (1924); *see also Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996).

Truhlar's silence means that he has forfeited his arguments against the union, *see Waypoint Aviation Servs. Inc. v. Sandel Avionics, Inc.*, 469 F.3d 1071, 1073 (7th Cir. 2006), but we reviewed his submissions in the district court to determine whether there is a convincing response to the union's appellate arguments. Even assuming, as the district court found, that the suit is timely, there is no sound basis on which Truhlar could show that his union breached its duty to represent him fairly during the grievance process. A union breaches its duty of fair representation only where its actions in pursuing a member's grievance are "arbitrary, discriminatory, or in bad faith." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991). In the district court, Truhlar argued that the union acted arbitrarily and in bad faith because, according to him, Smith (the union representative) did not conduct a sufficiently thorough investigation before withdrawing Truhlar's grievances. In particular, he blamed Smith for withdrawing his grievances while Truhlar's separate appeal from the adverse DOL decision was still pending and for

refusing to reinstate the grievances after learning that Truhlar won his appeal from the DOL's decision.

To demonstrate that the union acted arbitrarily, Truhlar must show that "in light of the factual and legal landscape" at the time the union acted, its decision to abandon his grievances was "so far outside a wide range of reasonableness, as to be irrational." *Air Line Pilots*, 499 U.S. at 67 (internal quotation omitted). That's a high threshold, and nothing we see in Truhlar's papers in the district court convinces us that he made the necessary showing. Although it is true that the union's duty requires some minimal investigation into a member's grievance, only an investigation that reflects "an egregious disregard for union members' rights constitutes a breach of the union's duty." *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1176 (7th Cir. 1995) (quotation omitted). Here, before deciding to withdraw Truhlar's grievances, Smith met with the local postmaster, reviewed the Postal Service's Investigative Memorandum and the unfavorable DOL decision, and considered the U.S. Attorney's rationale for declining to bring criminal charges. Based on that information, Smith made a rational decision to withdraw the grievances. Truhlar argued below that with some minimal additional investigation Smith would have learned that Truhlar appealed the DOL decision (it's unclear why he didn't just tell Smith himself), but it wasn't irrational for Smith to rely on the information conveyed by the postmaster. Even if Smith's failure to verify the information could be considered negligent, more is needed to establish a breach of the union's fiduciary duty. *See United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372-73, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990).

As for Smith's decision not to reinstate the grievances, the union points out (without rebuttal from Truhlar) that there is no mechanism under the CBA which would have allowed Smith unilaterally to reopen a final decision. That decision must be a mutual one between the Postal Service and the national union, which is not a party to this suit. We cannot find that Smith acted arbitrarily in failing to pursue a method of relief which Truhlar has not shown was available.

Nor does anything we see in the record support Truhlar's assertions (which, as we have noted, he submitted only to the district court) that Smith acted in bad faith when he withdrew and later failed to reinstate the grievances. To show bad faith Truhlar must point to subjective evidence showing that Smith's decisions stemmed from an improper motive. *See Nemsky*, 574 F.3d at 866; *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). Below Truhlar cited no such evidence but instead suggested that an improper motive is the only "reasonable explanation" for Smith's conduct. Such unsupported speculation is insufficient to overcome a motion for summary judgment. *Argyropoulos v. City of Alton*, 539 F.3d 724, 737 (7th Cir. 2008).

Our role is not to decide with the benefit of hindsight whether Smith made the right calls--we ask only whether his decisions were made rationally and in good faith. *See Neal*, 349 F.3d at 369. Our review of the undisputed facts (in the face of Truhlar's current silence on the subject) convinces us that they were. Accordingly, Truhlar's hybrid claim cannot withstand summary judgment. The judgment of the district court is AFFIRMED.

Footnote

1Technically, a hybrid suit where the employer is the Postal Service is grounded in 39 U.S.C. § 1208(b), but the law construing § 301 applies to suits against the Postal Service under § 1208(b). *See Roman v. USPS*, 821 F.2d 382, 388-89 (7th Cir. 1987); *Gibson v. USPS*, 380 F.3d 886, 888-89 & n.1 (5th Cir. 2004).

2/10/09
No. 06 C 2232

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

KENNETH T. TRUHLAR, Plaintiff,
v.
JOHN GRACE BRANCH # 825 of the NATIONAL ASSOCIATION OF LETTER CARRIERS, and THE UNITED STATES POSTAL SERVICE, Defendants.

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant John Grace Branch's Motion for Summary Judgment and Defendant United States Postal Service's Motion for Summary Judgment are hereby granted.

No. 06 C 2232

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

KENNETH T. TRUHLAR, Plaintiff,
v.
JOHN GRACE BRANCH # 825 of the NATIONAL ASSOCIATION OF LETTER CARRIERS, and THE UNITED STATES POSTAL SERVICE, Defendants.

February 10, 2009, Decided
February 10, 2009, Filed

REBECCA R. PALLMEYER, United States District Judge.

MEMORANDUM OPINION AND ORDER

On November 2, 1998, Plaintiff Kenneth Truhlar, a letter carrier with Defendant United States Postal Service ("USPS"), was rear-ended in a USPS vehicle while delivering mail. The following day, Truhlar filed a claim for workers' compensation and began working shorter days. Periodically, he was required to complete a form confirming his continuing need for partial disability payments. One of the fields on the form asked: "Have you worked outside your federal job during the period [for which you are claiming disability]?" On at least twenty-four forms completed from 2000 through the summer of 2001, Truhlar answered this question "No" or left it blank. In fact, however, during much of this time, Plaintiff was performing in a band, activity that generated around $

11,000 in income. Plaintiff claims that he was not actively trying to conceal this activity and that he honestly believed that the money he earned from the band's performances did not need to be reported on the form. Nevertheless, USPS initiated an investigation in the summer of 2001, and ultimately concluded that Plaintiff acted improperly by failing to report income on the government form. As a result, Plaintiff was issued a notice of removal on November 9, 2001.

Plaintiff filed grievances with his local union, Defendant John Grace Branch # 825 ("Branch 825" or "the Branch") of the National Association of Letter Carriers ("NALC"), protesting the notice of removal and other personnel actions taken by USPS in the summer and fall of 2001. In February 2002, the Branch and USPS agreed to hold Plaintiff's grievances in abeyance pending the outcome of a criminal investigation initiated by the United States Attorney's Office. In the summer of 2005, USPS learned that the U.S. Attorney had declined to prosecute Plaintiff, but concluded that Plaintiff's actions provided just cause for termination. Based on the evidence available at the time, Branch 825 agreed, and Plaintiff was terminated effective in fall 2005. The union declined to consider reopening the matter, even after the Employee's Compensation Appeals Board at the Department of Labor ("DOL") overturned a previous DOL decision and ruled that Plaintiff was not required to pay back the money he received while on partial disability.

Plaintiff filed suit against both the union and USPS, alleging that the former violated its duty to fairly represent his interests and the latter breached the collective bargaining agreement ("CBA") in place

between NALC and USPS. Both Defendants moved for summary judgment. For the reasons given below, both motions are granted.

FACTS

Truhlar began working for USPS in 1984 as a letter carrier in Westmont, Illinois. (825 56.1 ¶1.) On November 2, 1998, Plaintiff was rear-ended by another car while delivering mail on his route. (Investigative Memo. at 1, Ex. 64 to Pl.'s Mem.) The next day, Plaintiff filed a claim with DOL for partial disability payments. (825 56.1 ¶4.) Although the details of his work schedule are disputed, the parties agree that Plaintiff began working a reduced schedule after DOL accepted his claim, and that by November 2000, Plaintiff was working an average of four hours per day while continuing to receive partial disability payments. (Pl.'s Ans. to 825 56.1 ¶5.) In order to continue receiving these payments, DOL required Plaintiff to periodically complete a Form CA-7 "Claim for Compensation." (825 56.1 ¶6.) One of the questions on the CA-7 asked: "Have you worked outside your federal job during the period [for which you are claiming disability]?" (*Id.*) On at least twenty-four CA-7 forms submitted by Plaintiff, he either left that field blank or answered "no." (*Id.* ¶7.) During 2000 and 2001, however, Truhlar earned approximately $ 11,000 as a bass guitarist in the rock band, "Bang." (*Id.* ¶9.) Plaintiff also received $ 10,594.25 in disability compensation from DOL during this time. (*Id.*)

In the summer of 2001, the United States Postal Inspection Service (the "Inspection Service") began an investigation of Plaintiff's disability claim. (*Id.* ¶8.) On

June 27, 2001, following an interview with Truhlar concerning his income from the band, Postal Service Supervisor William Blaha placed Truhlar on emergency off-duty status, stating in a letter, "Your explanation about offsetting expenses and misunderstanding the form are unacceptable and your actions are inappropriate. Therefore you are placed in this status because retaining you on duty may result in loss of funds." (USPS 56.1 ¶4.) On July 12, Branch 825 filed a grievance on Plaintiff's behalf. (*Id.* ¶5.) The Inspection Service's investigation culminated in the issuance of an Investigative Memorandum on September 4, 2001, which concluded that Plaintiff "failed to report his outside employment and the subsequent income to the U.S. Department of Labor." (Investigative Memo. at 1, Ex. 64 to Pl.'s Mem.) The Memorandum relied, in part, upon a document prepared by Candace Vucsko, a Human Resource Specialist at USPS. In a "Memo to File" dated February 5, 2001, Vucsko wrote that she had a conversation with Truhlar in which she informed him that he needed to complete several parts of the CA-7, including the provision about outside income. (*Id.* at 2.) According to Vucsko's memo, Truhlar told her about a recording studio that he owned and said that he wrote and published songs; Vucsko warned that any earnings from those activities had to be reported on the form, but Truhlar assured her that he did not make any money from those activities. (*Id.*) The memo does not specifically mention Truhlar's participation in a band. At some unspecified point,[1] the U.S. Attorney's Office began an investigation into Truhlar's claims on the CA-7 forms. (825 56.1 ¶10.) On September 28, Westmont Postmaster Gary Reece met with Truhlar and his union representative to inquire about Truhlar's failure to report the outside income; on the advice of counsel,

Truhlar chose not to respond to the questions. (USPS 56.1 ¶6.)

On November 9, 2001, USPS issued a "Notice of Removal" to Plaintiff, advising him that his termination would become effective no sooner than thirty days later. (*Id.* ¶7.) The Notice identified four provisions of the Employee and Labor Relations Manual ("ELM") that Plaintiff had violated: 661.3 Standards of Conduct ("Employees must avoid any action . . . which might result in or create the appearance of . . . affecting adversely the confidence of the public in the integrity of the Postal Service"); 661.52 Unacceptable Conduct ("No employee will engage in criminal, dishonest . . . or immoral conduct"); 666.2 Behavior and Personal Habits ("Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service"); and 666.3 Loyalty ("Employees are expected to be loyal to the government and uphold the policies of the Postal Service"). (*Id.* ¶8.) Truhlar requested that the union file another grievance on his behalf, and Branch 825 did so on November 21. (*Id.* ¶9.) In yet another grievance filed that fall, the union challenged a "Letter of Demand" in which USPS demanded that Truhlar repay $ 227.80 in health care coverage that USPS believed it should not have paid. (Grievance Worksheet, Ex. 81 to Pl.'s Mem.)

Under the grievance procedure that governed Plaintiff's grievances,[2] a grievant could initiate a grievance at Step 1 and, if the grievance is not resolved by USPS, the Branch could appeal to Step 2. (825 56.1 ¶16.) If the grievance is not resolved at Step 2, the Branch could then appeal to Step 3, at which point the matter would be handled by the national union, and an

unfavorable outcome at this stage could then be appealed to arbitration. (*Id.*) In Truhlar's case, USPS denied his grievance at Step 1. (*Id.* ¶18.) After the Branch appealed his grievances to Step 2, USPS gave Eric Smith, the Branch vice-president, a copy of the Investigative Memorandum and told Smith that the U.S. Attorney's Office had criminally charged Truhlar. (*Id.* ¶20.) This was not accurate: Truhlar had not in fact been charged. The Branch and USPS nevertheless signed "Grievance Settlement" forms on February 25, 2002, agreeing to hold the grievances in abeyance "pending disposition of charges brought against [Truhlar] by the office of the United States Attorney on a related matter." (*Id.* ¶21.) The forms contain no reference to the DOL investigation (Grievance Settlement, Ex. G to Smith Decl., Attach to 825 56.1), but some evidence suggests the pending DOL proceedings were an independent basis for the decision to stay the resolution of the grievances. (Grievance Settlement, Exs. 57-59 to Pl.'s Mem; Anders Dep. 84:8-85:2, Ex. AA to Pl.'s Mem.) The parties also dispute the extent to which Truhlar was involved in the grievances: Smith asserts that Truhlar refused to discuss the grievances with Branch personnel at all, while Truhlar claims that he was never even contacted by the Branch. (Pl.'s Ans. to 825 56.1 ¶19.)

The grievances continued to be held in abeyance until the summer of 2005, when Dianne Anders, who became Postmaster at the Westmont facility in May 2005, asked several individuals about the Truhlar grievances. (USPS 56.1 ¶¶20-21.) In addition to receiving a copy of the Investigative Memorandum, Anders learned that DOL had denied Plaintiff's appeal of his compensation forfeiture (discussed in more detail below) and that the

U.S. Attorney's Office had declined to prosecute Truhlar. (*Id.* ¶¶21, 25, 26.) Assistant United States Attorney Michelle Nasser Weiss explained the decision not to charge Plaintiff criminally on the basis that the total dollar amount at issue was low, DOL had ordered Plaintiff to repay the full loss amount, and the Civil Division of the U.S. Attorney's Office was pursuing damages. (Declination Form, Ex. H to Smith Decl., Attach. to 825 56.1.) After discovering this information, Anders set up a meeting with Smith, who, after reviewing the same information, agreed to withdraw Truhlar's grievances. (USPS 56.1 ¶27.) On September 14, 2005, Smith formally withdrew the grievances. (*Id.* ¶28.)

Plaintiff received a Form 50 "Notification of Personnel Action" on October 17, 2005, informing him that his removal became effective September 23, 2005.[3] (*Id.* ¶32.) Later that day, Truhlar called Smith to see if he could file a grievance regarding the Form 50, and Smith told him he could not. Truhlar recalls that Smith told him, "You're a done deal. The case has been over years ago. There's nothing--nothing we can do for you." (*Id.* ¶33; Truhlar Dep. 159:12-17, Attach. to USPS 56.1.) When Truhlar, upset, responded with profanity, Smith stopped talking. (USPS 56.1 ¶33.) On October 25, Truhlar wrote a letter to NALC President William Young in which he recounted his conversation with Smith and asked the national union to intervene on his behalf. (Truhlar Letter, Ex. 30 to Pl.'s Mem.) The next day, Truhlar called Branch 825 President Jay Ricke, who set up a meeting for Truhlar with Smith and another union representative; at the meeting, Truhlar again requested that the union file a grievance over the Form 50 and was again told that the union could not do

so and that "it was a done deal." (USPS 56.1 ¶35.) On November 14, NALC executive vice president Jim Williams responded to Truhlar's letter and informed him that the national union would not intervene on his behalf because "the Branch determined just cause did exist . . . [and] the Branch made their decision based upon the case file and did not discriminate in any way I could see." (Williams Letter, Ex. 22 to Pl.'s Mem.)

At the same time the USPS grievance process and the U.S. Attorney's Office investigation were underway, the DOL Office of Workers' Compensation Programs ("OWCP") was evaluating Plaintiff's case to determine whether he would be required to forfeit the $ 10,594.25 he received in disability compensation from March 2000 to June 2001. (Decision of the Hearing Rep. at 1, Ex. 68 to Pl.'s Mem.) In May 2003, DOL found that Plaintiff knowingly omitted his earnings from the CA-7 forms and therefore had forfeited his disability compensation; after a hearing in January 2004 at which Plaintiff testified, on May 12, 2004, DOL affirmed its decision that Plaintiff must repay the $ 10,594.25. (*Id.* at 4.) Truhlar appealed this decision to the DOL Employee Compensation Appeals Board ("ECAB") in May 2005. (USPS 56.1 ¶19.) On January 12, 2006, after Plaintiff's grievances had been withdrawn and he had been terminated by USPS, ECAB overturned DOL's prior decision, concluding that Plaintiff was not required to repay the $ 10,594.25 because the CA-7 forms "did not reasonably put appellant on notice that he had to report all earnings." (ECAB Decision at 4, Ex. 34 to Pl.'s Mem.) It is undisputed that Truhlar never informed Anders or Smith that he had appealed to ECAB, but Truhlar contends that Anders nevertheless should have known because DOL forwarded a notice of the appeal to

USPS. (Pl.'s Ans. to 825 56.1 ¶¶41-42.) At any rate, in August 2005, before Anders asked Smith to withdraw Truhlar's grievances, Labor Relations Specialist Anthony Intoe informed Anders that they had "no record" of Truhlar's having appealed the May 2004 DOL decision (USPS 56.1 ¶26), and Plaintiff concedes that neither Smith nor Anders had actual knowledge of the appeal. (Pl.'s Ans. to USPS 56.1 ¶30.)

Truhlar filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") on December 29, 2005, alleging the Branch failed to file a grievance over his termination. (825 56.1 ¶46.) The NLRB dismissed the charge in February 2006, and affirmed the dismissal on April 20, 2006. (*Id.* ¶¶47-48.) The next day, Plaintiff filed suit in this court under section 301 of the Labor Management Relations Act of 1947 ("LMRA"), alleging that the Branch violated the duty of fair representation it owed to him and that USPS violated the CBA by terminating him without just cause. On March 30, 2007, the court denied Defendants' motions to dismiss Plaintiff's complaint as untimely. *Truhlar v. John Grace Branch No. 825 of NALC*, 06 C 2232, 2007 U.S. Dist. LEXIS 23875, 2007 WL 1030237 (N.D. Ill. Mar. 30, 2007). Defendants now move for summary judgment.

DISCUSSION

A court will grant a motion for summary judgment when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). At this stage in the proceedings,

the court does not weigh the evidence presented, but merely determines whether any genuine issues exist and require a trial. *See Winters v. Fru-Con Inc.*, 498 F.3d 734, 744 (7th Cir. 2007). The nonmoving party is entitled to all reasonable inferences that can be drawn from the record. *Freeland v. Enodis Corp.*, 540 F.3d 721, 737 (7th Cir. 2008). However, the nonmoving party must also identify, "with reasonable particularity," the evidence on which it relies, and the court need not "scour the record" searching for a genuine issue for trial. *Winters*, 498 F.3d at 744.

I. Statute of Limitations

The court first considers Defendants' contention that this action is barred by the statute of limitations. Actions such as this one that are brought under section 301 of the LMRA are subject to a six-month statute of limitations. *Chapple v. Nat'l Starch & Chem. Co.*, 178 F.3d 501, 505 (7th Cir. 1999). For such actions, the statute of limitations begins to run "from the time a final decision on a plaintiff's grievance has been made or from the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, that no further action would be taken on his grievance." *Id.* Defendants contend that the statute began to run on October 17, 2005, when Smith allegedly told Truhlar, "You're a done deal. The case has been over years ago. There's nothing--nothing we can do for you." (Truhlar Dep. 159:15-17, Ex. HH to Pl.'s Mem.) Truhlar understood from this conversation that "the local union wasn't going to do anything more for" him. (*Id.* at 152:23-152:1.) Based on these statements by Truhlar, Defendants maintain that Truhlar knew, or reasonably should have known, as of October 17, 2005, that the

union had chosen not to pursue his grievance. Plaintiff's action was filed on April 21, 2006, six months and four days later, which Defendants maintain places the entire action outside of the statute of limitations.[4]

Plaintiff advances two arguments to avoid this outcome. First, Truhlar argues that his conversation on October 17 only concerned a request for the Branch to file a grievance over his receipt of the Form 50 and did not relate at all to his past grievances. This argument ignores Plaintiff's own recollection of the conversation between himself and Smith as well as his understanding of that conversation. As noted above, Plaintiff was told that he was a "done deal," language which clearly suggests that his entire case then pending with the union was terminated, not just a new part about which he was calling. Indeed, not only does that language suggest finality to an objective observer, but Plaintiff himself understood that "the local union wasn't going to do anything more for" him. (*Id.*) Plaintiff's October 25 letter to NALC President William Young also confirmed that Plaintiff understood Branch 825's decision to be final, as he recounted that Smith explicitly told him "NO" in response to his question whether the Branch could do anything else to help him. Even though Plaintiff may have initiated the call with Smith to inquire about filing a new grievance, he clearly was informed that his entire case was no longer being pursued, and he clearly understood that this was what he was told as well. The fact that Plaintiff met with more union officials on October 26, who merely reiterated what they had already told him regarding the finality of his case, does not alter what Plaintiff was explicitly told and what he understood on October 17. October 17 remains the appropriate date to mark the

beginning of the limitations period.

Plaintiff's second argument is that, regardless of when the limitations period began to run, the statute was tolled while he pursued an internal appeal within the union. The six-month statute of limitations for section 301 actions is tolled while the plaintiff pursues "internal union remedies." *Frandsen v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Employees*, 782 F.2d 674, 681 (7th Cir. 1986). According to Plaintiff, his October 25 letter to NALC President Young constituted an appeal that should have tolled the statute of limitations until NALC Executive Vice President Jim Williams responded on November 14, 2005. Defendants note that the CBA does not provide any formal procedure for an appeal up to the national union. Because the cases applying *Frandsen* all relied upon a specific appeals procedure spelled out in the CBA or other document, Defendants contend, Plaintiff's letter does not support tolling under the *Frandsen* rationale. *See, e.g., Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 916 (7th Cir. 1999) ("subsequent cases from this circuit clearly limit tolling under *Frandsen* to the pursuit of formal or required internal procedures"). In response, Plaintiff points to the statement of Branch 825's former union steward Juli Muchowski, who asserted that "the national union office had the authority and ability to overrule and/or reconsider any decisions or recommendations of the local union." (Muchowski Aff. P 7, Ex. 20 to Pl.'s Mem.)

Reasonable minds could differ on this issue, but the court agrees with Plaintiff that the statute of limitations period was tolled from October 25 to November 14 while Plaintiff waited to hear back from

the national union. The rationale that supports the *Frandsen* rule supports extending it to the circumstances of this case as well. *Frandsen* invoked respect for the "national labor policy of encouraging workers to pursue internal union remedies." *Frandsen*, 782 F.2d at 681. A letter to the national union may not have been contemplated by the CBA, but it was nevertheless a remedy that afforded the possibility of relief without resort to the courts. Significantly, *Frandsen-style* tolling applies even to remedies that are ultimately considered futile, suggesting that plaintiffs should not be put in the difficult position of having to assess the merit or utility of their appeal to internal union procedures. *Id.* Applying this flexible principle to Truhlar's case, tollings should not be limited to appeals processes formally included in the CBA, if the employees understood that appeals are routinely dealt with in a manner not explicitly discussed in the CBA. Accordingly, Plaintiff's October 25 letter appealing to the national body of NALC merits tolling of the statute.

In reaching this conclusion, the court acknowledges that merely continuing a correspondence with the union does not toll the statute. *See Sosbe v. Delco Elecs. Div. of Gen. Motors Corp.*, 830 F.2d 83, 87 (7th Cir. 1987). Here, however, Truhlar made a specific request for assistance to the national union, and NALC was empowered to overrule Branch 825's decision. It appears that the national union itself did not view the letter as "simply a general appeal for help," as Executive Vice President Williams contacted Branch 825 representatives before concluding that NALC would not intervene. *Pantoja v. Holland Motor Exp., Inc.*, 965 F.2d 323, 328 (7th Cir. 1992). Truhlar's case

further differs from the general appeals for help discussed in *Sosbe* and *Pantoja* because, as Muchowski's uncontested affidavit averred, "the *proper* method of internally pursuing an appeal of any decision made at the local level would be to contact the national union regarding the decision." (Muchowski Aff. P 9, Ex. 20 to Pl.'s Mem. (emphasis added).) Muchowski further stated that not only was this frequently done while she was union steward, but that the national union "on many occasions overruled the decisions of the local union." (*Id.* ¶8.) Unlike the plaintiff in *Sosbe*, Truhlar was not writing a number of letters to various union officials generally pleading for help. He wrote one letter to NALC. This was, thus, not a situation where the plaintiff was attempting to "indefinitely delay resolution of labor disputes merely by bombarding his union with tiresome requests." *Sosbe*, 830 F.2d at 87 (quoting *Dozier v. Trans World Airlines, Inc.*, 760 F.2d 849, 852 (7th Cir. 1985)). In light of Muchowski's statements about the frequency and effectiveness of past appeals to the national union, the court is unwilling to dismiss his letter as simply an informal appeal, despite Plaintiff's failure to identify a specific passage of the CBA contemplating his appeal to NALC.

Indeed, answering this question the other way produces a result contrary to the goal of private resolution of labor disputes: if Plaintiff were required to consider that the statute of limitations was running while he awaited a decision on his letter to NALC--which had the authority to, and often did, reinitiate the grievance process--he may have filed a federal lawsuit prior to a final decision by NALC. Requiring an employee to initiate court action in these circumstances is inconsistent with federal labor policy generally and

the *Frandsen* rule in particular. *See Stevens v. Nw. Ind. Dist. Council, United Bhd. of Carpenters*, 20 F.3d 720, 729 (7th Cir. 1994) (recognizing "the *Frandsen* rationale of encouraging union members to pursue internal remedies"). The court concludes that the statute of limitations was tolled for the three weeks during which Plaintiff awaited a response to his letter, and his suit, initiated just four days outside of the start of the limitations period, is timely.

II. Breach of the Collective Bargaining Agreement

While the question as to whether the statute of limitations was tolled by Plaintiff's letter is a close one, the court has no difficulty concluding that Plaintiff's case fails on the merits. To prevail on a "hybrid" section 301 claim against both the union and the employer, the employee must show *both* that the union breached its duty of fair representation *and* that the employer violated the collective bargaining agreement. *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 368 (7th Cir. 2003). Accordingly, Plaintiff must establish genuine issues of material fact as to both Defendants to avoid summary judgment; if he cannot establish one of the claims, then both must fail. *Id.* ("the claims are interlocking in the sense that neither is viable if the other fails"). Turning to Plaintiff's claim that the USPS violated the CBA, the court concludes that Plaintiff has not established a genuine issue that the USPS did in fact violate the CBA.

Plaintiff argues that USPS violated the CBA because it did not have "just cause" to terminate Plaintiff. (CBA Art. 16.1, Ex. 40 to Pl.'s Mem. ("No employee may be disciplined or discharged except for just cause . . . .").)

Whether the facts establish the existence of just cause is a question of law to be decided by the court. *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1242 (7th Cir. 1997). The Joint Contract Administration Manual ("JCAM"), a document prepared jointly by NALC and USPS to assist in interpreting the CBA, describes "just cause" as a "provision [that] requires a fair and provable justification for discipline," with "no precise definition" or "rigid rules that apply in the same way in each case." (JCAM at 16-1, Ex. 73 to Pl.'s Mem.) USPS contends that it had "just cause" for giving Plaintiff a notice of removal and ultimately terminating his employment, highlighting several factors that demonstrate the procedural fairness of the decision-making process: the Inspection Service conducted an extensive investigation prior to issuing its reports, including interviewing people with knowledge of the events; Postmaster Reece met with Plaintiff prior to issuance of a notice of removal in an attempt to hear Plaintiff's side of the story; the USPS sent Plaintiff a detailed letter explaining the reasons he was being given a notice of removal; the USPS stayed its disciplinary actions pursuant to an agreement with Branch 825; and new Postmaster Anders inquired about the status of Plaintiff's case prior to asking the union to drop its pending grievances and proceed with Plaintiff's termination.

The JCAM lists six questions that may be useful in determining whether just cause exists. According to the JCAM, a reasonable just cause inquiry should examine: (1) was there a rule and was the employee aware of that rule; (2) is the rule reasonable; (3) is the rule enforced consistently and equitably; (4) was a thorough investigation completed; (5) was the severity

of the discipline reasonably related to the infraction; and (6) was the discipline administered in a timely fashion. (*Id.* at 16-3-4; *Jordan v. USPS*, 488 F. Supp. 2d 766, 773 (N.D. Ill. 2007)). Plaintiff devotes most of his argument to his contention that USPS cannot show that Truhlar was aware that he was violating any rule by not reporting his band income. The court disagrees. First, evidence contained in the Inspection Service's report suggested that Plaintiff was aware that he had to report income from his music activities, as Candace Vucsko wrote that she told him he needed to include income he derived from his recording studio and from writing songs on the CA-7.[5] (Investigative Memo. at 2, Ex. 64 to Pl.'s Mem.) Vucsko could not remember such a conversation during her deposition in this case, but the statement was nevertheless contained in the Investigatory Memorandum and could have reasonably been relied upon by USPS at the time it decided to issue the notice of removal. Similarly, the fact that ECAB stated in 2006 that Plaintiff did not knowingly misstate his income has no bearing on whether USPS possessed just cause in 2001 to issue a notice of removal. Because Plaintiff's claim is that USPS violated the CBA by issuing a notice of removal without just cause, the inquiry must be whether USPS possessed just cause at the time it made its decision. The ECAB decision therefore bears no relevance to USPS's just cause determination. Indeed, even if ECAB's findings had been made prior to USPS's issuance of the notice of removal, USPS would not have been bound to abide by those findings. *See NALC v. USPS*, 272 F.3d 182, 189 (3d Cir. 2001) (arbitrator in employment action between union and employer not bound by the Office of Workers' Compensation Programs determination).

Plaintiff also argues that the "rule" that was allegedly violated was the compensation forfeiture statute (5 U.S.C. § 8106(b)(2)), and that USPS was therefore required to find that Plaintiff "knowingly" lied on the forms as required by the statute. This argument fails for two reasons. First, to the extent a "knowingly" standard might be required, USPS need not meet the standard that would be applied by a court; such a reading would too tightly constrain the notion of "just cause." In making a just cause determination, USPS is not required, by either the CBA or the JCAM, to prove all of the elements listed in the JCAM at the level of formality necessary in a court proceeding. (JCAM at 16-1, Ex. 73 to Pl.'s Mem. (concept of just cause "contains no rigid rules that apply in the same way in each case of discipline or discharge").) Second, and more fundamentally, the Notice of Removal was not issued with the allegation that Plaintiff violated 5 U.S.C. § 8106(b)(2); the Notice of Removal actually charged Truhlar with "Unacceptable Conduct as Evidenced by Your Failure to Disclose Pertinent Information on Department of Labor Form CA-7," listing four separate ELM provisions. (Notice of Removal, Ex. 11 to Pl.'s Mem.) Even if USPS could not demonstrate that Plaintiff "knowingly" violated the statute by lying on his CA-7 forms to a degree that would satisfy a court, Plaintiff still could have run afoul of the ELM provisions regarding "Unacceptable Conduct," which prohibits employees from engaging in "dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service"; or the provision under "Standards of Conduct" that requires Plaintiff to not "affect[] adversely the confidence of the public in the integrity of the Postal Service"; or the provision specifying an employee's duty of loyalty,

requiring employees "to be loyal to the government and uphold the policies of the Postal Service." Thus, even if USPS lacked just cause to conclude that Plaintiff *knowingly* violated a federal statute, it nevertheless could have concluded from the evidence before it that there was just cause to conclude that Plaintiff had violated the ELM.

The other elements listed in the JCAM are easily satisfied and warrant little discussion: a rule against lying on government forms is clearly reasonable; its consistent enforcement is not in dispute; the thoroughness of the investigation is demonstrated by the Inspection Service's lengthy investigation that culminated in a five page written report with nineteen exhibits; and termination is a reasonable consequence of lying on a government form that impermissibly allows an individual to retain sums wrongly obtained from the government. The final element, that the discipline be administered in a timely fashion, is also met, as Plaintiff received his termination notice two months after the completion of the investigation and less than six months after the start of the investigation. Relying on the JCAM's guidelines for interpreting just cause, then, USPS possessed just cause to terminate Plaintiff.

Plaintiff also argues that USPS violated the CBA by failing to either hold his grievances in abeyance until the DOL appeal was resolved or to consider reinstatement after DOL found in his favor violated the CBA. This argument has little traction. Plaintiff does not cite a single provision in the CBA that the USPS violated by acting in this manner. The best he can do is point to deposition testimony from Postmaster Anders

that she might have acted differently had she known that Plaintiff's appeal was still pending; this falls far short of establishing a breach of the CBA. Indeed, as discussed above, Plaintiff cannot even show that the decision of the USPS to terminate his employment would have been different if it had known of DOL's decision in Plaintiff's favor. *See NALC*, 272 F.3d at 189. Plaintiff also urges that the 2002 agreement to hold the grievances in abeyance depended upon resolution of the DOL matter as well as the criminal investigation, but the record does not support this assertion. (2002 Grievance Settlement Forms, Ex. G to Smith Decl., Attach. to 825 56.1 (agreement to hold grievance in abeyance depended only on disposition by U.S. Attorney's Office); Smith Dep. 154:3-10, Ex. DD to Pl.'s Mem. (same).) Although Anders suggested in her deposition that the pendency of the DOL proceeding was relevant to her decision, Plaintiff has again pointed to no provision of the CBA that was violated by terminating him prior to final resolution of the DOL matter. This court is not required to scour the record in search of support for Plaintiff's argument, *see Winters*, 498 F.3d at 744, and Plaintiff cannot simply point to behavior that he believes is unfair and label it a violation of the CBA.

Finally, Plaintiff offers an alternative argument: if Truhlar's September 28, 2001 interview in which he declined to answer Reece's questions out of fear of a pending criminal investigation influenced USPS's decision to terminate him, the discharge was an unconstitutional violation of his Fifth Amendment rights. Although a private employer may be entitled to rely upon an employee's refusal to answer questions in its decision to terminate the employee, a government

employer such as USPS may not do so without extending immunity to the employee. *See Atwell v. Lisle Park District*, 286 F.3d 987, 990 (7th Cir. 2002); *Chan v. Wodnicki*, 123 F.3d 1005, 1009 (7th Cir. 1997) ("[T]he threat of job loss for a public employee is a sufficient threat to require that the employee be granted immunity from prosecution before he is required to answer questions about his public responsibilities."). There is no record of USPS's ever offering immunity to Truhlar, and the Notice of Removal issued to Truhlar does make a reference to Plaintiff's refusal to answer USPS's questions. (Notice of Removal at 2, Ex. 11 to Pl.'s Mem.) Still, the majority of the document is concerned with the substantial evidence against Plaintiff showing that he misrepresented his income on the CA-7 forms. (*Id.*) The court thus concludes that USPS's just cause determination was not impermissibly based on his refusal to answer questions.

Plaintiff has not established a genuine issue of material fact that would prove USPS violated the CBA. The court therefore has no reason to consider whether the union breached its duty of fair representation, because summary judgment must be granted in favor of both Defendants. *See Crider*, 130 F.3d at 1245.

CONCLUSION

For the reasons stated above, Defendant John Grace Branch's Motion for Summary Judgment [74] and Defendant United States Postal Service's Motion for Summary Judgment [79] are hereby granted.

Dated: February 10, 2009

/s/ Rebecca R. Pallmeyer

Footnotes

1 Branch 825 claims that the investigation began after issuance of the Investigative Memorandum. (825 56.1 ¶10.) Plaintiff is correct that the evidence Branch 825 relies on in support of the assertion--the declaration of its vice president, Eric Smith--is insufficient, as Smith lacks foundation to support his statement regarding when the investigation began. (Pl.'s Ans. to 825 56.1 ¶10.) The court further notes evidence in the Investigative Memorandum itself that the Inspection Service worked with an Assistant U.S. Attorney while investigating the charges against Truhlar, suggesting the U.S. Attorney's Office began its investigation prior to the issuance of the Investigative Memorandum. (Investigative Memo. at 3, Ex. 64 to Pl.'s Mem.)

2 The parties dispute whether the 1998-2001 CBA or 2001-2006 CBA governed Plaintiff's claims, and also dispute the significance of the differences in the grievance procedure between the two CBAs. (Pl.'s Ans. to 825 56.1 ¶¶15, 17.) Plaintiff did not, however, dispute that, at least the "Step 1, Step 2" terminology of the 1998-2001 CBA governed Plaintiff's claims (*id.* ¶18), and that the "Grievance Settlement" forms in 2005 confirm that the claim was handled pursuant to the numerical "step" framework. (Grievance Settlement, Exs. 57-59 to Pl.'s Mem.) The union maintains that both CBAs applied at various times during the four years that the grievances were pending. (825's Resp. to Pl.'s 56(b)(3) ¶1.) While a precise time line is impossible to trace from this record, the court agrees with the union that the choice of the applicable CBA is not material to

Plaintiffs' claims. (*Id.*)

3 Plaintiff argues that his termination did not become effective until either September 23 (the date given on the Form 50) or October 5 (the date the Form 50 was processed). (Pl.'s Ans. to USPS 56.1 ¶32; Pl.'s Mem. at 11.) Defendants alternately provide September 23 or September 14 (the day the grievances were withdrawn) as the appropriate date. (USPS 56.1 ¶32; 825 Reply at 3.) The parties spilled a great deal of ink in their briefs arguing about Plaintiff's actual date of termination, but the precise date has no bearing on any of the issues the court reaches in this opinion. The court therefore declines to determine the precise date of Plaintiff's termination.

4 The April 21 filing date is one day after the conclusion of the NLRB decision. This apparently is just a coincidence, and Plaintiff wisely does not argue that the NLRB appeal tolled the statute of limitations for this action. *See Brown v. Keystone Consol. Indus., Inc.*, 680 F. Supp. 1212, 1227 n.13 (N.D. Ill. 1988) ("The filing of unfair labor practice charges with the NLRB does not toll or prevent the accrual of a sec. 301 cause of action." (citing *Adkins v. Int'l Union of Elec., Radio & Mach. Workers*, 769 F.2d 330, 335 (6th Cir. 1985))).

5 The obviously hearsay nature of this statement is not relevant to the court's decision here, as the court is only determining whether USPS had just cause to issue Plaintiff a notice of removal in 2001. Nothing prevents USPS from considering this statement when it was provided in an internal report in making its just cause determinations.

No. 09-1652

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KENNETH T. TRUHLAR,
Plaintiff-Appellant,
v.
UNITED STATES POSTAL SERVICE, et al.,
Defendants-Appellees.

Before EASTERBROOK, Chief Judge, and MANION and EVANS, Circuit Judges.

ORDER

On April 26, 2010, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All of the judges on the panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc.

The petitions for rehearing and rehearing en banc are therefore DENIED.

US DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 10 CHI
LONDON, KY 40742-8300
Phone (312) 596-7157

Date of Injury: 11/02/1998
Employee: KENNETH T. TRUHLAR

May 9, 2005

EMPLOYEES COMPENSATION APPEALS BOARD
200 CONSTITUTION AVE NW ROOM N-2609
WASHINGTON, DC 20210

Dear Sir/Madam:

Enclosed is a request for review by the Employees' Compensation Appeals Board that was sent to the District Office in error.

Sincerely,

Michale Muryn
Claims Examiner

US POSTAL SERVICE
CHICAGO-SOUTH SUBURBAN MSC
INJURY COMPENSATION UNIT
6801 WEST 73RD STREET
BEDFORD PARK, IL 60499

37a

Routing Slip

To: Dianne Anders
Postmaster, Westmont Il 60559

From: Anthony D. Intoe
Labor Relations Specialist
Central Illinois District

Date: 8-22-05

Remarks

Re: Truhlar

This is the info I was able to get from the Inspection Service and Inquiry Comp.

Inquiry Comp said there is no record that he appealed the 5/12/04 decision.

This supports our position.

Also I am sending you an arbitartion award with a similar issue.

29 USC § 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 USC § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) **Jurisdiction**

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization

(1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) **Service of process**

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) **Determination of question of agency**

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts

performed were actually authorized or subsequently ratified shall not be controlling.

39 § 1001. Appointment and status

(b) Officers and employees of the Postal Service (other than those individuals appointed under sections 202, 204, and 1001 (c) of this title) shall be in the postal career service, which shall be a part of the civil service. Such appointments and promotions shall be in accordance with the procedures established by the Postal Service. The Postal Service shall establish procedures, in accordance with this title, to assure its officers and employees meaningful opportunities for promotion and career development and to assure its officers and employees full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions, with representatives of their own choosing.

39 USC § 1206. Collective-bargaining agreements

(a) Collective-bargaining agreements between the Postal Service and bargaining representatives recognized under section 1203 of this title shall be effective for not less than 2 years.
(b) Collective-bargaining agreements between the Postal Service and bargaining representatives recognized under section 1203 may include any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration, or the parties may adopt any such procedures by mutual agreement in the event of a dispute.

(c) The Postal Service and bargaining representatives recognized under section 1203 may by mutual agreement adopt procedures for the resolution of disputes or impasses arising in the negotiation of a collective-bargaining agreement.

39 USC § 1208. Suits

(b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.
(c) A labor organization and the Postal Service shall be bound by the authorized acts of their agents. Any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforcible only against the organization as an entity and against its assets, and shall not be enforcible against any individual member or his assets.